



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE BALOGUN
PANEL: Ms E Whitlam
Dr RP Fernando

BETWEEN:

Mr J Gibbins
And
Whitbread Group Plc

Claimant
Respondent

ON: 12-14 February 2019 & 17 April 2019
7 June 2019 (In Chambers)

Appearances:

For the Claimant: Mr M Gibbins, Father
For the Respondent: Mr M Foster, Solicitor

RESERVED JUDGMENT

All claims fail and are dismissed.

REASONS

1. By a claim form presented on 12 May 2018, the Claimant brought complaints of sexual orientation discrimination and sex discrimination. All claims were denied by the Respondent.
2. The Claimant gave evidence on his own account. We also heard from his witness, Nikki Terry (NT), former Host. On behalf of the Respondent, we heard from Shantanu Tare (ST), Hotel Manager, Paige Johnson (PJ), former Operations Manager and; Rebecca Conn (RC), Operations Manager. The parties presented a joint bundle of documents

and references in square brackets in the judgment are to pages within that bundle. A number of additional documents were handed up over the course of the hearing. These were not added to the bundle and if referred to in the judgment, will be by description.

The Issues

3. The issues in the case are set out in the case management order of Employment Judge Sage of 16 August 2018 and are referred to more specifically in our conclusions below [36-37].

The Law

4. Section 13 of the Equality Act 2010 (EqA) provides that a person (A) discriminates against another (B) if because of a protected characteristic (in our case sex and sexual orientation), A treats B less favourably than A treats or would treat others.
5. Section 23 EqA provides that on a comparison of cases for the purposes section 13, there must be no material difference between the circumstances relating to each case.
6. "The relevant circumstances" for the purposes of the statutory comparisons are those which the Respondent took into account when deciding to treat the Claimant as it did. If the relevant circumstances are to be "the same or not materially different" all the characteristics of the Claimant which are relevant to the way his case was dealt with must be found also in the comparator. They do not have to be precisely the same but they must not be materially different. MacDonald v Advocate General for Scotland and TSB Governing Body of Mayfield Secondary School [2003] IRLR 512 House of Lords.
7. Section 19 EqA, provides that, where A applies a provision, criterion or practice (PCP) to B, it is discriminatory in relation to the protected characteristic (in our case sex) if:
 - a. A applies or would apply the PCP to persons who do not share B's sex
 - b. It puts or would put persons of B's sex at a particular disadvantage compared with persons not of his sex.
 - c. A cannot show that the PCP is a proportionate means of achieving a legitimate aim.

Burden of Proof

8. Section 136 EqA provides that if there are facts from which the court could decide, in the absence of any other explanations that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
9. The leading authority on the burden of proof in discrimination cases is Igen v Wong 2005 IRLR 258 That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the Claimant. Where such facts are proved the burden passes to the Respondent to prove that it did not discriminate.
10. In the case of Madarassy v Nomura International PLC [2007] IRLR 246 it was held that the burden does not shift to the Respondent simply on the Claimant establishing a

difference in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase “could conclude” means that “a reasonable Tribunal could properly conclude from all the evidence before it that there may have been discrimination.”

11. In cases of indirect discrimination, the burden is on the Claimant to prove the PCP and that it placed or would place persons that share his characteristic at a particular disadvantage compared to others. Nelson v Carillion Service [2003] IRLR428

Findings of Fact

12. The Claimant was employed by the Respondent between 22 September 2016 and 17 February 2018, latterly in the role of Team Leader/Host at the Premier Inn Hotel, Eltham. Premier Inn Hotel is part of the Whitbread Group of companies. The Claimant’s role was primarily customer-facing though there were some back-room functions, such as cashing up, dealing with deliveries and closing down the restaurant at the end of service.
13. On 22 January 2018, the Claimant attended a 1-2-1 meeting with Emily Buffoni (EB) Assistant Operations Manager, who was responsible for managing the Hosts on site. There were 3 Team Leader/Hosts; the Claimant, Jamie Rozza (JR) and Jerdine Ferrell (JF). The Claimant contends that JR and JF are gay and he relies on them as his comparators for the purposes of his direct sexual orientation claim. He further relies on JF as his comparator for the purposes of the direct sex discrimination claim.
14. At the 1-2-1 meeting, the Claimant was told by EB that his performance had fallen below expected standards and he was set him performance targets, details of which are set out a follow up letter to the Claimant dated 22 January 2018. [104-105]
15. On 12 February 2018, the Claimant attended an investigatory meeting, chaired by JP, following which he was suspended on full pay pending the outcome of investigations into 3 allegations: i) performance related issues on shift close down (which, by the time of the dismissal hearing had become an allegation of “*failure to carry out reasonable request by your manager*”) ii) Uniform Standards and iii) Not completing sage checks [111]. On the same day, the Claimant was sent a letter inviting him to attend a disciplinary hearing on 17 February 2018 in order to answer the allegations [112]
16. In relation to the first matter, it was alleged that the Claimant only completed 40% of the close down tasks after the end of service on 8 February 2019. In relation to the second matter, it was alleged that the Claimant was in breach of the uniform policy by not having his shirt tucked in. On the final matter, which the Respondent viewed as the most serious of the 3, it was alleged that the Claimant breached cash control procedures by failing to physically count the number of cash bags in the safe when cashing up.
17. The disciplinary hearing was conducted by RC, then Hotel Manager, Sevenoaks, and at the end of the hearing, the Claimant was advised that he was summarily dismissed. [128] The Claimant appealed the dismissal but following an appeal hearing on 26 March 2018, conducted by ST, the dismissal was upheld [151-153]

Submissions

18. The parties sent in written submissions after the hearing, which the tribunal considered in chambers. I do not propose to set out the contents here.

Conclusions

19. Having considered our findings, the parties' submissions and the relevant law, we have reached the following conclusions on the issues:

Direct discrimination on grounds of sex and sexual orientation

20. The act of less favourable treatment is said to be the dismissal. The Claimant alleges that he was dismissed because he is not gay and is male. His comparators are those identified at paragraph 13 above.
21. The Claimant's case on sexual orientation discrimination is set out at paragraphs 148 and 150 of his witness statement. He says that PJ was seeking a move to a senior job in the Respondent's new flagship Bromley South Premier Inn hotel. The Claimant contended that in order to support her application, PJ needed to show how tough she was as a manager by dismissing someone at the Eltham hotel, which had performance problems. To that end, she took the decision to target him for disciplinary action and then to dismiss him because he is "straight", rather than his gay comparators, as they had more rights under the law than he did because of their sexual orientation (an obviously incorrect statement of the law as the EqA provides the same protection to all sexual orientations). He does not allege that PJ is gay, in fact he says that she is not. His assertion is based on his "*own observation*" and the fact that on other occasions, he was disciplined for things when his comparators were not. He has not provided evidence of those other occasions. All we are left with therefore is a difference in treatment and sexual orientation coupled with pure speculation. That does not constitute proven facts from which we could conclude discrimination.
22. Although it is unnecessary to do so given the lack of evidence at stage 1, we have considered whether the Respondent's explanation for dismissal is genuine and in no way related to sexual orientation. This is not an unfair dismissal claim (the Claimant had insufficient service) and so the factors relevant to such a claim are not necessarily relevant to the genuineness of the explanation. We make that point now because much of the Claimant's cross examination of the Respondent's witnesses, and indeed his closing submissions, focused on flaws in the investigation and decision-making process. To be clear, in carry out our assessment, we have not considered whether it was fair to dismiss the Claimant.
23. The dismissal letter says that dismissal is for gross misconduct and cites the matters referred to at paragraphs 15 and 16 above [128]. Taking each of those matters in turn:
Serious breach of the Company's Finance Policy and Procedures Manual.
24. The Respondent's cash control procedures are set out in its Finance Policy Manual dated August 2016 [204]. The manual provides that at on a shift change, there should be a full safe/cash check completed. The Claimant signed an acknowledgment slip in September 2016 agreeing to adhere to the policies in the manual. [78]
25. Separate from the policy is a local instruction headed "*Important points to remember*" which makes some practical points about handover. [98]. The Respondent told us that the contents of the safe should be emptied and counted and recorded on a safe handover sheet. Their case was that the Claimant failed to count the money bags in the

safe on handover. The Respondent relies on CCTV footage of the Claimant carrying out safe checks incorrectly on the 4th, 6th and 8th of February 2018.

26. On 16 January 2018, PJ sent a Whatsapp message on the department Whatsapp group, part of which read: "*Please take this as a final warning – the next time I find out we haven't physically counted the safe I will investigate you. It's unacceptable and is now classed as a critical fail on finance*". This indicates two things, firstly, that the Claimant knew that he had to physically count the bags in the safe and secondly, that the warning was sent to all staff and therefore anybody who failed to comply could have been subject to disciplinary action.
27. One of the areas of concern brought up by EB at the 1-2-1 meeting on 22 January 2018 was the safe check and we accept the Respondent's evidence that the Claimant had been shown by EB how to carry it out properly.
28. The notes of the investigation meeting, which the Claimant signed at the time as an accurate record of events, show that when this allegation was put to him, he did not deny it. When asked whether he understood the severity of the allegation, he said: "*I do, it's a dumb thing*". He puts his actions down to it being busy in the restaurant and reproached himself for being so stupid [117].
29. It appears from this that there was evidence supporting this allegation against the Claimant. Conversely, there was no evidence that the Claimant's comparators were breaching the policy.

Uniform Standards

30. All service staff are subject to the Respondent's Appearance Policy. The policy set out the required standard of personal appearance and dress at work and applies to both uniformed and non-uniformed staff [90-91]. The Claimant was part of the uniform wearing workforce.
31. Although having a tucked in shirt was not specifically cited in the policy as a requirement, the Respondent's view was that men should tuck in their shirts as untucked shirts were untidy. The Claimant accepts that there were occasions when his shirt was untucked but says that this was always out of sight of customers. The Respondent disputes this. Given that the Claimant admitted at the investigation meeting that he had been asked before by a manager to ensure that his shirt was tucked in during the shift and his admission that he occasionally untucked his shirt (albeit out of customer sight) we are satisfied that the Respondent genuinely believed that the Claimant was guilty of a breach of the uniform code.
32. As far as his comparators are concerned, JF is female and the shirt that she was required to wear as part of her uniform was different to the men's shirt. It was tailored and did not need to be tucked in. In the case of JR, the undisputed evidence from the Respondent was that he always had his shirt tucked in, even when he was in the back office. The circumstances of the comparators were therefore different from the Claimant's as they were not in breach of the uniform policy.

Failure to carry out reasonable request by your manager

33. The request in question was about completion of the shift close down tasks. This was one of the matters raised with the Claimant by EB in his 1-2-1 meeting. When acting as Host, the Claimant is the person supervising the shift and therefore responsible for ensuring that all the tasks are done. A list of the close down tasks is set out at paragraph 15 of NTs statement and the Respondent did not challenge these. The Respondent relies on photos taken of the kitchen showing dirty receptacles, cutlery trays not cleaned, cereals for the next day not replenished and other incomplete tasks following the Claimant's shift on 8 February 2018 [110a-d].
34. At the investigation meeting when it was put to the Claimant that the task on his shift were not completed, he does not deny this but explains that it was busy and he forgot to check everything. [113].
35. Given that the factual allegations were essentially admitted by the Claimant, we are satisfied that the Respondent genuinely believed that the Claimant was guilty of the allegations and that this was the basis for pursuing disciplinary action against him.
36. There was no evidence before us that the Claimant's comparators had committed the same or other disciplinary offence and therefore subjecting him to disciplinary action rather than them is explained by reasons unconnected to his sex or sexual orientation. We also observe that as JR is also male, the sex discrimination complaint was never going to succeed.
37. Turning to the decision to dismiss, this was taken by RC to whom the motive that the Claimant attributed to PJ for instigating disciplinary action, did not apply. Neither did it apply to ST, who upheld the dismissal on appeal. However, the Claimant argued that RC and ST were accomplices of PJ and therefore equally as guilty of discrimination. That suggests that, knowing PJs discriminatory motives for instigating disciplinary action, they dismissed the Claimant without good reason, in order to assist her. In our view, that theory is as speculative and far-fetched as the Claimant's original proposition, which we have already rejected.
38. We are satisfied from RCs disciplinary outcome report of 23 February 2018, that the Claimant was dismissed because the allegations against him were considered proved and two of the allegations were deemed to be gross misconduct [129-130]. We are satisfied that the decision had nothing whatsoever to do with sex or sexual orientation. The direct discrimination claim fails.

Indirect discrimination on grounds of sex

39. This complaint relates to the application of Appearance Policy, specifically, the requirement for men to tuck in their shirts.
40. The first point to make is that this requirement is not a neutral requirement applied across the business to everyone as it only applies to men and not to women. It cannot therefore constitute a PCP for the purposes of an indirect sex discrimination complaint.
41. Even if we are wrong about that and the PCP should be more generally described as the application of the Appearance Policy, there was no evidence before us that this put men

at a particular disadvantage compared to women. Indeed, there was evidence of other men complying - We were told that JR always had his shirt tucked in. Further, the Claimant's evidence was that it did not cause him any particular difficulty and that he always had his shirt tucked in when he was in the public areas. His evidence was that he was more comfortable having his shirt untucked when he was doing the cash check in the back office and did not like being tucked in on the journey into work, which would be in his own time, in any event. Having a preference is not the same as being at a disadvantage. Even if having the shirt untucked was more comfortable than having it tucked in, the Claimant was always able to comply with the requirement.

42. The Claimant has not discharged the burden of proving that a PCP was applied that put him or men at a particular disadvantage compared to women. The claim is therefore not made out and fails.

Judgment

43. The unanimous judgement is that all claims fail and are dismissed.

Postscript

44. As mentioned above, the Claimant did not have sufficient service to bring an unfair dismissal complaint. That, in our view, was fortunate for the Respondent as the disciplinary process carried out left a lot to be desired in terms of the fairness of the investigative process and the sanction of dismissal. So, whilst many of the questions asked and arguments put on behalf of the Claimant were not relevant to the decision we had to make, in other circumstances, they would have been entirely justified.

Employment Judge Balogun
Date: 2 July 2019

